COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Petition for Investigation and Complaint of Gaslantic Corporation pursuant to G. L. c. 164, Sections 76 and 94 against Fall River Gas Company Regarding the Assessment and Collection of Transportation Rates Contrary to the Filed Tariff and Applicable Requirements of Law	DPU 96-101

MEMORANDUM IN OPPOSITION TO FALL RIVER GAS COMPANY MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT AND MOTION TO COMPEL ANSWER OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT FOR PETITIONER

Introduction

Gaslantic Corporation ("Petitioner") received on October 21, 1996 the "Answer, Motion to Dismiss and Motion for Summary Judgment of Fall River Gas Company" (the "Company") and pursuant to 220 C.M.R. 1.04(5) and 1.06(6)(e) hereby files this response to such motions and moves the Department of Public Utilities (the "Department") to order the Company to file a responsive Answer [1] in accordance with 220 C.M.R. 1.04(2) or in the alternative, to grant Summary Judgment in favor of Petitioner based on the uncontradicted facts in Petitioner's unanswered Petition and accompanying affidavit.

[1]. The Company Response ("Company Response") is captioned "Answer" but in fact, as is made clear in Company's footnote 3, page 4 of Company Response, the Company has not answered the factual allegations in the Petition and has reserved "the right to [dispute the recitation of facts set forth in Gaslantic's Petition] should this matter proceed to hearing." Upon the dismissal of the Company's motions, the Company should answer those factual allegations or Petitioner's motion for summary judgment should proceed based on the uncontradicted facts in the Petition and its accompanying affidavit of John Cory.

Overview

The gravamen of Petitioner's complaint is that the Company cannot read it s own tariff. After the Company Response, it is clear that the Company cannot read the orders it has cited. In an embarrassing effort to avoid dealing substantively with Petitioner's complaint, the Company seeks procedural grounds to dismiss the complaint and cites Department orders which clearly and unequivocally refute its procedural arguments.

The Company argues that Department should dismiss the Petitioner because of the "long passage of time"[2]. Company Response, at page 6. The Company cites D.P.U. 85-13-4 (1986) in support. Elsewhere, the Company represents to the Department, without qualification, that "As a matter of law, Gaslantic's claims are also barred by the statute of limitations, G.L. c.260, Section 5A (prohibiting actions based upon consumer protection theory four years after the alleged cause of action accrues)." Company Response, page 10. In the **Company's cited case**, D.P.U. 85-13-4[3], the Department addresses such arguments unambiguously.

> "The Department finds that the statute of limitations for contractual actions is applicable in this case because it is well settled that the relationship between a utility company and its customers is contractual in nature. See Burke v. Boston Gas Company, D.P.U. 19820 (1979); Key v. Boston Edison Company, D.P.U. 19355 (1978); Boston Gas Company v. Parks, D.P.U. 1425 (1985); Valente v. Boston Gas Company, D.P.U. 84-86-10 (1985). G.L. c. 260, Section 2 states: 'Actions of contract . . . shall . . . be commenced only within the six years next after the cause of action accrues.'"
> D.P.U. 85-13-4, page 6-7.

If this is how the Company reads cases, there can be little doubt it cannot read its own tariff. The Company is much better than its conduct here. The Department should end its embarrassment quickly and on substantive grounds.

Petitioner responds to the Company's motions in detail in the following and respectfully requests that, unless the Company files affidavits[4] or other proof inconsistent with the presently uncontradicted facts, the Department grant Petitioner's Mot ion for Summary Judgment on the merits.

1. The Company correctly cites applicable standards for motions to dismiss and for summary

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[2]. About four years have passed since payment of the disputed bill in question and the filing of the Petition.

[3]. In this matter, a complainant was allowed to recover, with interest, for overpayments caused by a malfunctioning meter from 1958 through 1984. The cause of action did not even accrue until discovery of the problem in 1984. Id., page 8-9.

[4]. Affidavits from the Company can accelerate the hearings in this matter since Petitioner then will be able to identity the Company officials it intends to subpoena in accordance with 220 C.M.R. 1.10(9).

judgment and then uncomprehendingly argues factual issues which preclude the granting of such motions under the applicable standards.

Among the arguments raised by the Company are claims that Petitioner's request for rebate is inconsistent with the Department's precedents that firm sales customer should not subsidize firm transportation customers. Company Response, page 6. Whether a rebate here amounts to such prohibited subsidization presents a distinctly factual question, which would in general preclude Department action without factual hearings. The Department, for purposes of the Company's motion, is required to ignore such an allegation and assume facts favorable to the non-moving party.

For purposes of Petitioner's motion for summary judgment, the Department can use its expertise to conclude that the factual assumption favorable to Petitioner, that no prohibited subsidization occurred, is in fact warranted as a factual finding. In other words, the Company's assertion that a "Delaware corporation" would be subsidized if it paid only pipeline marginal costs for gas supplied by the pipeline at this price to the Company in August of the year is preposterous on its face. The Department is fully capable of concluding which party was subsidized by the payment of over $15/MCF for summertime gas [5].

Another argument in support of its motions is that the equitable doctrine of laches bars Petitioner's complaint, Company Response, page 10. Again, the Company raises distinctly factual arguments that must be resolved in favor of the non-moving party. Whether the delay in question was reasonable or unreasonable and whether if unreasonable, the Company was prejudiced or not are factual issues requiring factual hearings.

For the purposes of Petitioner's motion for summary judgment, however, the Department may again use its discretion in concluding that whatever was the character of the delay, the Company has held Petitioner's funds throughout the period and cannot maintain any credible claim of prejudice.

Another argument in support of the Company's motions is that the principle of "accord and satisfaction" bars Petitioner's complaint, Company Response, page 10-11. Again, the Company raises a distinctly factual argument that must be resolved in favor of the non-moving party for purposes of the Company's motion. Here, as before, the Department can go beyond a factual assumption in Petitioner's favor and make a factual determination on the Company's "accord and satisfaction" defense. The Company has admitted that Petitioner sought a rebate of payments made by Globe in 1992 and "ultimately rejected a Company proposal to settle". Company Response, page 4. The Company cannot now claim that it did not understand that Petitioner was asserting Globe's rights

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[5]. If the Company claims it is incurring part of its portfolio costs to provide discretionary summertime balancing and then has not priced those balancing services to recover the costs incurred, the Company has a much more general problem which the Department should investigate without penalizing Petitioner for the Company's inability to design tariff pricing correctly.

against it or that Petitioner, when it rejected the Company's settlement, was still dissatisfied.

Finally, while claiming not to dispute Petitioner's recitation of facts, the Company appears to have done just that by asserting that "Globe elected to continue to take service from Fall River" during the days when Petitioner failed to deliver, Company Response, page 4. If the Company means to assert by this that Globe had something to elect, i.e., that Globe made a conscious choice because it was told by the Company that its supply was interrupted and that under the tariff it would be interrupted unless it paid the standby fees of the Company, a genuine and very material issue of fact would exist.

Petitioner has already controverted, in the filed affidavit of John Cory, Exhibit B to the Petition, the existence of any such elective choice. Substitute service was provided by the Company before Petitioner or Globe knew that Petitioner's supplies had been interrupted. For purposes of the Company's motion, this fact is assumed. For purposes of the Petitioner's motion, the Company should file a contrary affidavit or allow the Department to make a finding consistent with Mr. Cory's uncontradicted affidavit.

2. The Company shows no comprehension of its own tariff and its own services when it erroneously accuses Petitioner of mixing the concepts of balancing and standby service.

The crux of the substantive dispute in this case is whether the supply of gas by the Company to Globe during the three days in August, 1992, when, unbeknownst to Petitioner, Petitioner's supply of gas was interrupted, is properly characterized as balancing service or standby service. This is not rocket science. The Department can read the tariff. The Department knows its precedents. The Department can resolve this substantive question without further ado.

The Company correctly claims the two services in question are distinct and not interchangeable, Company Response, page 5. Petitioner agrees the services are distinct. The scope of each service does not overlap with the other. Petitioner has never claimed otherwise. However, the Company incorrectly claims that it supplied standby service on the days in question.

In response, Petitioner first and foremost points at the tariff. That is the law applicable here. However, Petitioner will repeat its analysis of the plain tariff language below, after addressing the Company's specious claim that the Department has somehow "defined" the difference between balancing and standby service in "extensive precedent".

The Company cites Commonwealth Gas Company, D.P.U. 87-122 at pages 7, 26, 34. The Department's conceptual discussion is far from a definition [6] and actually supports Petitioner's view.

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[6]. The Department has wisely refrained from "defining" what balancing and standby service mean in this evolving market of "unbundled" and increasingly competitive services. Any such definition would be "outgrown" by circumstances in short order. The Department appreciates that it is incumbent upon gas

The prime distinction between standby service and balancing is that standby service is for those customers "who could not risk an interruption of gas supply availability ." Id., at 26. Customers, such as Globe, which have accepted the risk of interruption [7], do not fit into the category of customers who need to elect to take standby service. Such c ustomers can accept the risk of balancing service. With balancing service, the Company has no obligation to supply gas. The Company can exercise its discretion to supply no balancing gas at all. M.D.P.U. 2 14-A, Paragraph 13.A ("The Company is not obligated on any Day to deliver to the Custom er amounts of Gas in excess of amounts received from the Transporting Pipeline for the Customer's account or, in any event, in excess of the Customer's MDTQ. The Company may elect to provide such gas at its sole discretion.") The Department's focus on the risk of interruption shows that the Department understands the basic difference between balancing and standby service far better than the Company.

The character of the contract obligations stated in the tariff co nfirms this distinction between balancing and standby service. Consistent with the customer's acceptance of risk of interruption, balancing is a discretionary supply service. Paragraph 13.A, id. Consistent with the standby customer's need to avoid risk of interruption, standby service is a mandatory service. When a customer has elected to receive and pay for standby service, the Company ha s the obligation to supply gas. See: Paragraph 18.C, id.

The Company attempts to create a phony definition bas ed on whether there is any gas at the city gate or no gas at the city gate [8], Company Response, p age 5. When there is no gas, the Company claims there is no balancing. The definitions of "Imbalance" and "Negative Balance" in M.D.P.U. 214-A, Paragraphs 1.0 and 1.R, support no exclusion of the "no gas" case from balancing. The Department has made no such distinction. To the contrary, both the Department and the language of the Company tariff make the sensible and correct distinction between the acceptance of risk of interruption (which is balancing service) and the non-acceptance of risk of interruption (which is elective standby service).

Having wrongly accused Pe titioner of seeing no distinction between balancing and standby

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companies to think through and clearly state the differences between its service offerings in its tariff contract with its customers. **See**: D.P.U. 85-13-4, page 6 (1986); D.P.U. 1425, page 4 (1985).

7. See: Cory Affidavit, paragraph 7, Exhibit B to Petition.

8. While the Company cites approvingly Department language which relates balancing to any differences between city gate receipts and burn-tip deliveries, the Company clearly abandoned reliance on such language when it expanded its simple minded distinction between gas and no gas at the city gate and made balancing inapplicable to any differences at the city gate between nominations and receipts. M.D.P.U. 245, Paragraph 1.0, page 3, Exhibit D to Petition.

service, the Company also postu lates a phony fear: that no one will take standby service if balancing does the same thing. The Company understands its tariff be tter than it admits. The Company has the right to interrupt its balancing service "at its sole discretion". Anyone who cannot accept this risk will be a candidate for either the Company's standby service, or in the future, competitive standby service from third parties.

The party which has failed to distinguish between balancing service and standby service is the Company, not Petitioner. The Company has the right to interrupt balancing service. The Company could have done this in August, 1992. The Company, not Globe, elected not to interrupt gas service. The Company's election did not, however, convert balancing service into standby service. By virtue of its election, the Co mpany acquired no right to impose standby service, as a "no notice" "put", on a customer such as Globe which has not elected to take standby service during the summer months.

3. As the Department has indicated, a detailed review of the terms and conditions of the Company's new tariff must be conducted in due course and the Company seeks to avoid this much needed review by applying cloture standards, applicable to a party, on Petitioner who is a non-party.

The Company appears to be much troubled by the prospect of a detailed review of its new tariff, approved pursuant to a settlement on October 16, 1996 in D.P.U. 96-60, page 6. Both the Company, and the Department in D.P.U . 96-60, cite and rely upon the approval of similar terms and conditions in Commonwealth Gas Company , D.P.U. 95-102 (December 22, 199 5). The Department, however, indicated in Commonwealth Gas Company, that its approval of the terms and conditions was "on an interim basis", id., page 45, and was done "provisionally", id., page 46.

The Department clearly foresees a need for a more detailed review of the terms, particularly those dealing with balancing and standby service, id., page 47. This case offers not only a concrete example of the problems with the new terms and conditions [9], but also an immediate opportunity to do so.

The Company argues against any such review, for obvious reasons, by comparing Petitioner's request to that of a party to a case seeking to avoid cloture of all relevant issues after a Department ruling. The Company's citations [10] are inapposite. Petitioner was not a party and did not have its rights closed by any prior

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[9]. See: Petition at pages 2-3, 14-16.

[10]. Boston Edison Company , D.P.U. 90-335-A at 4 (1992); Cambridge Electric Light Company/Commonwealth Electric Company , D.P.U. 91-234-E/94-115 at 10-12 (1994).

participation in D.P.U. 96-60 [11].

In another embarrassing attemp t to avoid review, the Company mistakenly cites two sources f or the apparent proposition that the Department has an established practice of exercising its dis cretion to dismiss efforts by non-part ies to "relitigate issues previously raised", Company Response, pag e 7-8. First, the Company cites 220 C.M.R 1.06 as authority for the discretion of the Department to dismiss the instant Petition. The cited regulation involves only the Department's discretion in the discovery process, 220 C.M.R. 1.06(6)(c), not Department dis cretion to dismiss petitions such as the instant Petition.

The Company also cites Cambridge Electric Light Company/Commonwealth Electric Company , D.P.U. 91-234-E/94-115 at 15, 16 (1994), as "express pre cedent" for the proposition that the Department has the discretion under the applicable regulations to dismiss efforts "to relitigate issues previously" raised. The cited case is limited to the Department's IRM regulations wh ere the Department has reserved the di scretion to open an investigation or not. 220 C.M.R. 10.07(3). There is no extension, express or otherwise, of this case beyond the IRM regulations. Id., page 16-17.

4. The Company's abbreviated effort to argue that the tariff language supports its right to force standby pricing on Petitioner should be summarily rejected by the Department.

The Company has no case on the merits of the tariff language and its anemic effort to muster such arguments is dramatic p roof of this failing, Company Response page 9-10.

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[11]. Like all settlements, the Department expressed, for the benefit of the settling parties and parties in future adjudications such as this one, its normal reservations with respect to the precedent effect of its approval. "In accordance with the terms of the Settlements, our acceptance of the Settlements does not constitute a determination as to the merits of any allegation, contention, or argument made in this investigation. Finally, we note that our acceptance of the Settlements does not set a precedent for future filings, whether ultimately settled or adjudicated." D.P.U. 96-60 at page 7.

The Company first attempts to fall back on its generally applicable Terms and Conditions and cites its general provision regarding the "unauthorized use of gas", M.D.P.U. 192A, Paragraph 4.J, Company Response, page 9. When gas is actually "unauthorized", such a provision is the source of the Company's right to disconnect customers. Here, the Company cannot show that its supply of gas, at its choice, to Globe was "unauthorized", particularly in light of the more explicit language of its transportation tariff dealing with balancing. As the Company itself has cited, "the relationship between a utility company and its customers is a contractual arrangement which necessitates either an express or implied agreement by the customer to accept the financial obligation to pay for the service." D.P.U. 1425, page 4 (1985). It is hardly credible for the Company to argue that its general provision regarding "unauthorized gas" creates an implied agreement that its customers would pay the elective standby charges for a gas supply which fits within the more explicit language of its balancing service.

The Company next cites tariff language to make the point that transportation service is available only for customer supplied gas. The point is tautological. The Company transports customer gas. The Company sells its own gas. There is no argument beyond this point. Balancing service when there is a "Negative Balance" always involves the supply by the Company of its own gas to make up the difference between the city gate receipt and the burner-tip delivery. The Company, to no avail, is back to its "gas/no gas" distinction, **supra**.

The Company attempts to use the definition of the capitalized term "Gas" to prove that balancing is available only when "Gas", in positive quantities, is delivered to the city gate, Company Response page 9-10. There is no such magic in the word, "Gas". Nothing in the definition precludes a zero volume of "Gas". In addition, there is no argument that can be built on the differences in the tariff between the use of the word, "gas" (Company owned gas), and its capitalized form, "Gas" (customer owned), since the tariff is not consistent in making such distinctions. **See**: Use of

"Gas" in "Negative Balance" (Paragraph 1.R), Paragraph 13.B and Paragraph 18.C.

The Company's final argument i s not entirely comprehensible. The Company argues that because the customer had the **qualified** right to alter its election not to take standby service " **with the consent of the Company**", the Company had the right to force standby service on the customer in the days in question. The predicate to the Company's right to decide to consent to the requested alteration is a request for alteration. Because the custome r might make such a request creates no right in the Company to supply standby gas when the request is not made.

The Company's argument is nothing more than a repetition of its mischaracterization that "Globe elected to continue to take service", Company Response, page 4. Uncontradicted evidence demonstrates that Globe and Pe titioner made no such election since neither knew of the interruption in supply until after the fact. Exhibit B to Petition, paragraph 5.

5. The Company's evidentiary precedents do not bar the Department's consideration of the changes in the Company's tariff or the existence of an offer to settle by the Company.

The Company argues that the new tariff has no probative value and cites, Ladd v New York, New Haven & Hartford Railroad , 335 Mass. 117 (1956). The latter case involves an accident at a rail crossing where a flashing light signal was installed after the accident and the court held that the installation was not an admission of liability. This is a different holding than that claimed by the Company. The Department is not precluded from assess ing the probative value of the differences between the tariffs.

Similarly, the Company cites Puzo v. Puzo , 342 Mass. 775 (1961), for the point that the offer of settlement, admitted to have occurred by the Company, has no relevance or probative value. Politely put, the case does not stand for this proposition and in fact, in the case in question, a challenged conversation was deemed admissible as an admission of fact. Since the Company has raised

"accord and satisfaction" as an issue, the Department clearly has the discretion to consider the probative value of the existence of an offer of settlement and the Company should not be heard to argue otherwise.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Department:

(A) Deny the Motion to Dismiss and the Motion for Summary Judgment of the Company;

(B) Grant Petition's Motion to compel an answer and order such answer filed in accordance with the applicable regulations;

(C) in the absence of a timely and responsive answer, or in the event such answer raises no genuine issue of material fact, grant Petitioner's Motion for Summary Judgment and order the Company to refund to Petitioner, as assignee of Globe, the amount of $16,941.81, together with interest from the date of payment to the Company by Globe to the date of refund by the Company to Petitioner;

(D) Based on the Company's blatant disregard of the terms of its own tariffs, order the Company to pay Petitioner's costs of this proceeding;

(E) Commence the investigation of the anti-competitive impact of the terms and conditions in M.D.P.U. 245 cited in Paragraphs 26 through 28 of the Petition herein; and

(F) Order such other relief that the Department may deem just and reasonable or otherwise appropriate under the circumstances.

Respectfully submitted,
GASLANTIC CORPORATION
By its Attorney

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Edward L. Selgrade, Esq.
Law Offices of Edward L. Selgrade
200 Wheeler Road, 4th Floor
Burlington, Massachusetts 01803
Telephone: (617) 229-9140
Fax: (617) 270-0418

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